

Diane Aqui, SBN 217087  
daqui@smithdollar.com  
SMITH DOLLAR PC  
Attorneys at Law  
404 Mendocino Avenue, Second Floor  
Santa Rosa, California 95401  
Telephone: (707) 522-1100  
Facsimile: (707) 522-1101

Attorneys for Respondent SCOMAS OF SAUSALITO, LLC

**UNITED STATES OF AMERICA**  
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**  
**REGION 20**

UNITE HERE, LOCAL 2850,

CASE NO.: 20-CA-116766

Petitioner,  
v.

**RESPONDENT SCOMAS OF  
SAUSALITO, LLC'S POST HEARING  
BRIEF**

SCOMAS OF SAUSALITO, LLC

Respondent.

**I.**  
**INTRODUCTION**

This is a withdrawal of recognition case analyzed under *Levitz Furniture Co. of the Pacific 333 NLRB 717 (2001)* with a slight permutation from facts typically presented.

The Employer, Scoma's of Sausalito, was presented with a decertification petition on October 28, 2013 with signatures of 54% of the members of the current bargaining unit. Based on objective evidence, Scoma's withdrew recognition from Unite Here, Local 2850 ("Union"), three days later on October 31, 2013.

However, unbeknownst to Scoma's, on October 29, 2013, the Union had collected revocation signatures through the use of unlawful coercion from 6 of the 29 employees who had signed the decertification petition. Further, on October 30, 2013, an additional 2 of the 29 employees signed a document stating they "wished to continue to be" represented by the Union.

Based on these 8 signatures, of which Scoma's knew nothing, the General Counsel contends that Scoma's unlawfully withdrew recognition.

Scoma's contends that it possessed a majority of valid signatures when it withdrew recognition, and the "revocation" signatures were obtained by the Union through coercion, and were therefore invalid. Scoma's also contends that in order to foster stability in the bargaining relationship, the Union had a duty to notify it of these revocation signatures either before or after withdrawal of recognition. Between October 28, 2013 when Scoma's received the petition and October 31, 2013 when recognition was withdrawn, Scoma's received no evidence from the Union or the employees that contradicted the evidence Scoma's relied upon to withdraw recognition.

The Union's failure to inform Scoma's that some of the employees might still support the Union has led to an unstable and uncertain situation for at least the last 18 months (and continuing until this case is ultimately resolved), specifically because an election could have been held to determine the true desire of the employees and avoided the waste of resources and time.<sup>1</sup> This goes beyond mere Union gamesmanship, as it affects employees' Section 7 rights and delays what should have been an orderly process for determining a question concerning representation.

Of note, there are no allegations or evidence that the decertification petition was tainted, or that the employer initiated/assisted the petition. There are also no unfair labor practices charges other than the instant one which concerns the withdrawal of recognition only.

General Counsel, Respondent and Union stipulated to many of the underlying facts in this case, and the only factual issues to be determined are whether specific coercive statements were made by the Union in the presence of 6 employees while soliciting "revocation" signatures and whether an additional two employee signatures on a second document are authentic/valid.

Additionally, should it be determined that the Union did not unlawfully obtain revocation signatures, rather than a bargaining order (which would reward the Union for its complete failure to notify Scoma's of determinative evidence in its possession), the appropriate remedy should

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<sup>1</sup> The employees' Decertification Petition, filed on October 29, 2013 in Case No. 20-RD-115782, was subsequently withdrawn as moot after Scoma's withdrew recognition and before the Union filed the instant Unfair Labor Practice Charge.

either be a complete dismissal or an election to determine the intent of the employees and effectuate the intent of the National Labor Relations Act.

## **II.**

### **UNDISPUTED FACTS SHOWN AT THE HEARING**

The following undisputed facts were either stipulated to by General Counsel and Respondent's Counsel, or presented via testimony as indicated.

#### **A. Background:**

Respondent, Scoma's of Sausalito, LLC, is a restaurant, and its employees (servers, dishwashers, bartenders, hostesses and busers) have been represented by Unite Here, Local 2850 since at least 2000. The last collective bargaining agreement signed between the parties expired on November 18, 2008. A new agreement was negotiated in December of 2010, but was never signed. This unsigned agreement expired on September 30, 2012, over a year before the events described herein occurred.

As of October 31, 2013, the bargaining unit consisted of 54 employees.

On October 31, 2013, Scoma's withdrew recognition from the Union in reliance on a decertification petition received on October 28, 2013, signed by 29 of the 54 members of the bargaining unit. (Respondent's Exhibit 1).

Roland Gotti, General Manager at Scoma's for over 15 years, testified that after the collective bargaining agreement negotiated in December of 2010 expired at the end of September 2012, it wasn't until October 28, 2013, over a year later, that the Union requested negotiations with Scoma's. Lian Alan, lead organizer for Unite Here, admitted this, and testified he didn't request negotiations with Scoma's until after he heard about the pending decertification petition.

#### **B. Decertification Petition and Withdrawal of Recognition:**

Mr. Gotti testified that on Monday, October 28, 2013, the decertification petition, entitled "Petition for Decertification (RD)-Removal of Representative (Respondent Exhibit 1), was delivered to his home by Gina Canche, a Scoma's employee. The Decertification Petition contained the following statement: "Should the undersigned employees make up 50% or more of the bargaining unit represented by Unite Here Local 2850, the undersigned employees hereby request that Scoma's Sausalito withdraw recognition from this union immediately as it does not

enjoy the support of a majority of employees in the bargaining unit.”

Later that evening, Mr. Gotti received an email from Lian Alan requesting negotiations (Joint Exhibit 3). This was the first time since the expiration in September of 2012 of the unsigned contract that the Union had ever contacted Scoma’s to negotiate a new contract, or contacted them for anything at all.

Mr. Gotti reviewed the employee signatures on the Petition for Decertification, and compared the signatures to the signatures on each employee’s I-9 form and W-4 form (Joint Exhibit 5). Mr. Gotti also counted the number of bargaining unit employees on the payroll as of October 30, 2013 (54). He then determined that the percentage of signatures on the decertification petition was 54% (29/54).

In reliance on the Decertification Petition, and as instructed by the employees’ petition, Scoma’s withdrew recognition on October 31, 2013 (Joint Exhibit 3). Between October 28, 2013 when Mr. Gotti received the petition and October 31, 2013 when recognition was withdrawn, Scoma’s received no evidence from the Union or any employees that conflicted with the evidence Scoma’s relied upon to withdraw recognition. Even after Scoma’s withdrew recognition, Scoma’s received no information from the Union which conflicted with its objective belief and evidence that the Union did not have the majority support of the bargaining unit employees.

Ms. Canche testified regarding the circumstances of gathering the employee signatures on the petition. Of note, there are no allegations that she coerced the employees to sign this petition, there are no allegations of employer assistance or taint, nor are there any other unfair labor practice allegations regarding the validity of the decertification petition.

### **C. The Union “Revocation” Signatures.**

On October 29, 2013, Lian Alan met with six Scoma’s employees who had signed Ms. Canche’s Decertification Petition: Fernando Montalvo, Juan Jose Santos, Luciano Yah Chi, Rene Rivera, Nicolas Villalobos, and Jose Magdaleno.

Mr. Alan testified that he first met with these employees at about mid-afternoon, in front of the restaurant at about the time the shift changed, but later moved down the pier away from Scoma’s. Maria Munoz, another member of the Union, but not an employee at Scoma’s, was also

present, in addition to Clem Hyndman, the Union's shop steward for Scoma's.

Mr. Alan testified that Fernando Montalvo, Juan Jose Santos, Luciano Yah Chi, Rene Rivera, Nicolas Villalobos, and Jose Magdaleno signed a document revoking their signature on the decertification petition. This revocation document states, "If I signed a petition to decertify or get rid of the Union, I hereby revoke my signature. I do wish to continue being represented by UniteHere Local 2850 for the purpose of collective bargaining (General Counsel Exhibit 3).

In addition to signing that document, Luciano Yah Chi, Rene Rivera, Nicolas Villalobos, and Jose Magdaleno also signed a document entitled "We Are United!" (General Counsel Exhibit 4). This document states in part, "We wish to continue to be represented by UNITE HERE 2850 for the purposes of collective bargaining. We want to bargain with the management of Scoma's. . ."

There was no evidence as to why Fernando Montalvo's and Juan Santos's signatures were not on this document; however, it is inferred from the undisputed parts of the testimony regarding the sequence of events that they had already left the group at the time the other employees were asked to sign this document.

A seventh employee, Jessica Taylor, also signed both documents; however, she had not previously signed the Decertification Petition, and her signature is of no relevance. Neither Maria Munoz nor Clem Hyndman, present during the events, were called to testify by the Union or General Counsel.

### **III.**

#### **DISPUTED FACTS: COERCIVE STATEMENTS MADE BY LIAN ALAN WHILE GATHERING REVOCATION SIGNATURES**

##### **A. Testimony of Employee Witnesses:**

Juan Santos, Luciano Yah Chi, Rene Rivera, Nicolas Villalobos, and Jose Magdaleno were called by the Employer as witnesses, and testified about statements made by Lian Alan in the conversations that occurred outside the restaurant and at Barren House prior to them signing the "Revocation Document" (General Counsel Exhibit 3).

Employee Juan Santos is a dishwasher who has worked for Scoma's for about two years. Mr. Santos testified that he was with Fernando Montalvo, Luciano Yah Chi, Rene Rodriguez,

and Jose Magdaleno in front of Barren House with Mr. Alan. Mr. Santos testified that Mr. Alan said that, “we had to sign, because we could lose our job or immigration could come over.”

Employee Luciano Yah Chi has been a salad maker at Scoma's for 8 or 9 years. Mr. Yah Chi testified that he was with Fernando Montalvo, Jose Santos and Nicolas Villalobos in front of Barren House with Mr. Alan and Clem Hyndman. He testified that Lian Alan told them that “if there is no Union, they will take away benefits.”

Employee Nicolas Villalobos has worked for Scoma's for 10 years. He testified that he was leaving the restaurant and was with Jose Magdaleno, Luciano Yah Chi, and Rene Rodriguez. Lian Alan, Clem Hyndman and “another lady” (assumedly Maria Munoz). Mr. Villalobos testified that Mr. Alan said, “Did you sign with Gina? Did you know that Gina and Maria are friends? Friends of Roland. Did you know that they’re removing the signatures to give Roland the preference, so that the day that you’re no longer useful, they can fire you? So that you lose your rights and everything. So that the day that you’re no longer useful to them, they can fire you.” Mr. Villalobos testified that Mr. Alan stated that “he [Roland] could also throw immigration at us. . .”

Employee Jose Magdaleno has worked at Scoma’s for 12 years as a salad maker. He testified that he met with Mr. Alan at the side of Scoma’s, by the pier. There were about 6 people with him, including Luciano Yah Chi, Rene Rodriguez, and Nicolas Villalobos. Mr. Magdaleno testified that Mr. Alan said that if they didn’t sign with him, Roland would take away all the benefits we were given. Mr. Magdaleno testified that Mr. Alan said that Roland had started hiring people with documentation, instead of people without documentation. . . “And that’s why I signed with him, because I got scared.”

Employee Rene Rodriguez has worked at Scoma’s for two years as a dishwasher. Mr. Rodriguez testified that he was in a group with Jose Magdaleno, Luciano Yah Chi, Clem Hyndman, and several others. He testified that Lian Alan said “if I didn’t sign my boss would fire me, they would cut my hours and cut my breaks, and lunch breaks . . . he said if he didn’t sign this document that the boss would throw immigration at us for not signing up with them.”

In short, the employee testimony was remarkably consistent on one key point: Lian Alan employed overt threats, including a challenge to the employees’ immigration status, to coerce

them to sign the “revocation” document.

**B. Testimony of Lian Alan:**

Lian Alan’s testimony differs from that of the five employee witnesses in two respects. The first is that Mr. Alan does not recall any specific conversation about immigration, and denies making any statements about the employees losing their jobs or benefits if they didn’t sign the revocation documents. After Lian Alan heard the testimony of the Scoma’s five employee witnesses, and in response to General Counsel’s questions in rebuttal, Mr. Alan responded as follows:

“Q. In your discussions with employees on October 29<sup>th</sup>, did you ever say to employees that if they did not revoke their signatures from the decertification petition, the Employer would call immigration on them?

A. No.

Q. Did you ever say to employees that if they did not revoke their signatures from the decertification petition, the Union would somehow call immigration on them?

A. No.

Q. Did you ever say to employees during those conversations that if they did not revoke their signatures from the decertification petition the Employer would. . . from that time forward only hire employees with verified employment authorization status?

A. No.

Q. Can you recall specifically any –any specific discussion of immigration issues in those conversations on October 29<sup>th</sup>?

A. I do not recall.”

The second difference between Lian Alan’s version and the 5 employee witnesses is testimony about where the conversations took place and who was present. Lian Alan testified that he first spoke with Fernando Montalvo, Juan Santos, Luciano Yah Chi, Rene Rivera, Nicolas Villalobos and Jose Magdaleno in front of the restaurant. He stated that “kind of as I was talking to Fernando, other people were arriving and having to leave to other jobs”.

According to Lian Alan, after speaking for an unknown period of time in front of the restaurant, the group then moved down the pier towards another restaurant, Barren House. Mr.

Alan testified that Fernando Montalvo was in a rush and left after he signed the revocation document (General Counsel Exhibit 3), but it is unclear from the testimony exactly where and when that occurred, or what events transpired before Mr. Montalvo left. Mr. Alan also testified that “Fernando had signed and then had to leave, so he was not with us on the pier. Juan, Luciano, Rene, Nicolas and Jose signed after Fernando had to leave, and then Luciano, Rene, Nicolas and Jose stayed with me, Clem and Maria Munoz on the pier.”

Refuting Mr. Alan’s deliberate inference that he spoke with Fernando Montalvo only briefly in front of the restaurant before Fernando left, are both Juan Santos’ and Luciano Yah Chi’s testimony that Fernando Montalvo was with them in the group at Barren House, located down the pier from Scoma’s. Juan Santos and Luciano Yah Chi both testified that the conversations with Lian Alan took place as they were leaving the restaurant, on the side of Scoma’s, and by the pier at Barren House.

While the other three employee witnesses (Nicolas Villalobos, Jose Magdaleno, and Rene Rivera) did not mention Fernando at Barren House (or elsewhere), this is expected concerning an ongoing group conversation that began in front of the restaurant and migrated down the block. It is also consistent with the inference supported by Lian Alan’s and Juan Santos’ testimony and the group photograph (General Counsel Exhibit 5) that Fernando Montalvo and Juan Santos were not present during the entire meeting. Further, Mr. Alan testified that when the group moved about half a block away from the restaurant, the group consisted of Clem Hyndman, Maria Munoz, Nicolas, Luciano, Jose, and “possibly a couple of other workers”, which is consistent with Fernando Montalvo being present at Barren House. Note that Mr. Alan was very careful with his words and did not testify that Fernando was never with them on the pier or never walked with them down to the pier.

**C. Reasonable Inferences from Disputed Testimony:**

From the testimony and exhibits, it is reasonably inferred that on Tuesday, October 29, 2013, Lian Alan, Maria Munoz and Clem Hyndman met up with Scoma’s employees Fernando Montalvo, Juan Santos, Luciano Yah Chi, Rene Rivera, Nicolas Villalobos, and Jose Magdaleno as they were leaving their shifts. The entire group (including Fernando Montalvo, Juan Santos, Luciano Yah Chi, Rene Rivera, Nicolas Villalobos and Jose Magdaleno) spoke in front of the

restaurant, and then moved down the pier towards Barren Restaurant.

While the entire group was together (both in front of the restaurant and down the pier by Barren House), Lian Alan made coercive statements regarding immigration and loss of job benefits which were necessarily heard by all six employees, including Fernando Montalvo (and Clem Hyndman and Maria Munoz). After continuing to speak for a while, Fernando Montalvo signed the revocation document (General Counsel Exhibit 3) and left. Juan Santos then signed the revocation document (General Counsel Exhibit 3) and left. The remaining group then signed both the revocation document (General Counsel Exhibit 3) and General Counsel Exhibit 4. Lian Alan took a group photograph of Jose Magdaleno, Rene Rivera, Clem Hyndman, Maria Munoz, Luciano Yah Chi and Nicholas Villalobos, and everyone then left.

#### **IV.**

#### **CREDIBILITY OF WITNESSES**

##### **A. Credibility of Roland Gotti:**

Roland Gotti, Scoma's General Manager, was called by Respondent for the purpose of testifying about the decertification petition and the withdrawal of recognition. He also testified on cross-examination that he did not discuss the hearing with any of the employees, but that he knew some Scoma's employees met with counsel approximately a week before the hearing. Though he saw the employees meeting in the lounge, he did not participate nor did this meeting take place during working hours as the employees were not in uniform. Mr. Gotti testified that he did not arrange this meeting, nor was he aware of how it was arranged. He was forthright when he testified and there is no reason to doubt Mr. Gotti's truthfulness.

##### **B. Credibility of Georgina Canche:**

Georgina Canche was called for the purpose of testifying about the gathering of the signatures on the decertification petition.<sup>2</sup> Ms. Canche testified that during the 4 year period of time she had worked at Scoma's, she never saw any agent of the union, including Lian Alan, come to Scoma's until after she filed her petition for decertification on October 29, 2013. She also testified that she read the Decertification Petition (Respondent Exhibit 1) in English and

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2. It should be noted that Ms. Canche filed a Motion to Intervene in this case to defend her decertification petition and oppose a bargaining order if an unfair labor practice charge is found, but her Motion was denied at the opening of the hearing.

translated it to Spanish for the employees prior to their signing. General Counsel attempted to impeach her credibility by referring to the statement she provided to the Board (General Counsel Exhibit 6), specifically that portion which states, “When I approached employees with the decertification petition, I let employees sign if they wished to. For employees who only spoke Spanish, I explained to them that the petition was for employees that did not wish to be represented by the Union any longer. . . . Every employee that signed the petition was told what the petition was for and had the opportunity to review the petition.”

Despite General Counsel’s effort to impeach her credibility, Ms. Canche’s testimony was entirely consistent with the affidavit she gave the Board. Further, on redirect, Ms. Canche also reiterated that section of her affidavit which stated, “I speak Spanish fluently and was able to clearly communicate the intent of the petition to employees,” and testified that she “clearly communicated” by reading the Petition in Spanish to the employees. Juan Santos, Luciano Yah Chi, Nicolas Villalobos and Jose Magdaleno also corroborated Ms. Canche’s testimony that she read the petition in Spanish to them.

Of note, there are no allegations that Georgina Canche coerced the employees into signing the decertification petition, nor any credible evidence that any employee was misled by her. Ms. Canche’s testimony was credible.

**C. Credibility of Employee Witnesses:**

All 5 employee witnesses, Juan Santos, Luciano Yah Chi, Rene Rivera, Nicolas Villalobos, and Jose Magdaleno, are non-English speaking and testified through an interpreter. Their testimony was consistent with each other’s testimony, with only minor, and wholly natural variances. Though they were each sequestered, the substance of their testimony was essentially identical (e.g., Lian Alan told them if they didn’t revoke their signatures they would lose benefits, lose their jobs, and their immigration status would be challenged). While there was no direct evidence presented about the employee witnesses’ immigration status, it can be inferred from the testimony that their work authorization status and ability to work was of grave concern to them. For example, Mr. Magdaleno testified that he was scared when Mr. Alan told him that Scoma’s had started hiring people with documentation, instead of people without documentation: “And that’s why I signed with him, because I got scared.”

Providing testimony under oath in a public hearing is an intimidating experience for these witnesses. They were not born in this country, and have little experience with courts or attorneys. Mr. Gotti explained in cross examination testimony that many of his employees spoke Mayan, and Spanish was not their first language. Witnesses Luciano Yah Chi and his brother Jose Magdaleno, are Mayan as evidenced by their surname (Yah Chi). It was clear from some of the witness testimony that they were having trouble with the interpreter and did not understand some questions or meanings of words.

For example, Luciano Yah Chi did not know that Attorney Diane Aqui, whom he met with the week prior to the hearing, was an attorney for Scoma's, and did not know what "meeting" or "during work hours" meant. When asked what he did to prepare for the hearing he said "I do not know what it means in Spanish." At one point, the interpreter said, "Your Honor, the witness is having problems with the word meeting. He doesn't understand what a meeting is."

As another example, on cross-examination, Mr. Santos testified that he had not met with Scoma's attorney prior to the hearing (which he referred to as a "meeting"), he had never gone over any questions with Scoma's attorney, and that he was just told that there was a meeting scheduled. Though he testified inconsistently regarding whether he knew he was going to be called as a witness (at one time, he said yes, and at another time he said "I did not know" and found out "only a moment ago"), he clearly stated that he didn't understand, at which point the interpreter opined he was answering with "a little bit of uncertainty."

This uncertainty is understandable and should not compromise the substance of Mr. Santos' testimony or any of the witnesses' testimony regarding Lian Alan's statements. It is natural for an immigrant employee, with all eyes on him, to feel nervous and uncertain and not understand certain legally-laden words, particularly when the proceeding is not in their native language. The most important and fearful word these witnesses understand is **immigration**, not "meeting", "subpoena", or anything else.

Nor would these 5 employee witnesses be favorably disposed to testify in favor of Scoma's merely because of their employment. Should Scoma's prevail, these employees would no longer have union protection, and they could be terminated with impunity. If they truly

wanted the Union, they might have been assured that it would protect them, yet they chose to testify against the union that could have been their protector. Further, two of the witnesses were frustrated and upset to be at the hearing. Nicolas Villalobos testified he was “angry for being out there” and Jose Magdaleno testified that the union had done nothing for him; however, on the other hand, he also testified that Scoma’s hadn’t given him a raise in 12 years (“I don’t know why we are here; here is boss and he pays our check and here is Union for 12 years and never get a raise. . .”)

Four of the employees testified they had met with Scoma’s attorney, Diane Aqui, (including Luciano Yah Chi once it was made to clear to him on redirect that Diane Aqui was actually Scoma’s attorney). The General Counsel may argue that the witnesses were paid to meet with Scoma’s attorney, Diane Aqui, in the week before the hearing during working hours to prepare their testimony and “get their stories straight”. This is not true.

Roland Gotti testified that this meeting was not held during working hours, as the employees were not in uniform. Jose Magdaleno was actually working at Trident, the restaurant next door and came on his break. Nicholas Villalobos testified that he wasn’t working and came in for the meeting. He also said he didn’t pay attention and just picked up “the [subpoena] paper that told [him] to come”. Rene Rivera testified that he met with the attorney for about an hour, and Jose Magdaleno, Mario De Leon, and Luciano Yah Chi were also there. Mr. Rivera also testified that this meeting was in Spanish and English and when asked if he spoke enough English to understand “an hour of an attorney speaking,” he replied “a little bit.”

It is difficult to imagine how Scoma’s’ attorney would be able to prepare the witnesses’ testimony due to their lack of English language skills, and her lack of Spanish skills. The reasonable inference based on the testimony is that the meeting was for the purpose of issuing subpoenas only.

Additionally, as much as possible with an interpreter, the five employee witnesses’ testimony was corroborated by the others. They were sequestered and did not know what each others testimony was (unlike Lian Alan who was present during all testimony). They answered questions clearly and respectfully, and without argumentation, unlike General Counsel’s witness Lian Alan. These employees have absolutely nothing to gain by fabricating their testimony.

**D. Credibility of Lian Alan:**

Lian Alan's testimony is suspect as he has a bias: he wants to keep his job with the Union and appear as a competent "lead organizer". He wants to be seen in the best light possible, and does not want it known by his superiors that he has done basically nothing at Scoma's since the expiration of the contract in September of 2012, and couldn't even manage to get the December 2010 contract signed. Admitting that he coerced employees to revoke their signatures by making threats about immigration could very well be the nail in his coffin. He has every reason to lie and to obscure the truth.

Lian Alan had been employed by Unite Here as an organizer for about 7 and a half years at the time these signatures were gathered. He had received some professional training which discussed the role of the union during a decertification and representational campaign. Obviously, his job is to defeat any decertification effort at all costs. Mr. Alan testified that he was the union organizer assigned to Scoma's, and that he "continuously represent[ed] the employees at Scoma's from 2006 through November of 2013". He also testified that he was involved in enforcing [collective bargaining] agreements at Scoma's between 2006 and November of 2013. He testified that "when there were issues that came up, I spoke with employees; I spoke with the Company, if needed. . ." This testimony was misleading at best.

On cross-examination, Mr. Alan was unable to answer whether any grievances were filed between December 2010 and October of 2013. Surely, this is something he would know. Roland Gotti testified that he did not hear from Lian Alan at all since December of 2010. Gina Canche testified that she had never met Lian Alan in the four years she worked at Scoma's until she filed the Decertification Petition, and had never seen any agent of the Union at Scoma's. Juan Santos stated that he had never seen Lian Alan before he met him on October 29, 2013. Luciano Yah Chi said he had seen him only once or twice.

Clearly, Lian Alan embellished his testimony regarding his involvement at Scoma's. Despite his statement that he "spoke with the Company, if needed" he omitted to state that not once since the last contract was negotiated in December of 2010 has it ever been needed, or that he ever spoke to the company. Nor was he even aware of whether the employees at Scoma's had ever filed any grievances since December of 2010. It wasn't until after Lian Alan heard about

the Decertification Petition that he contacted Scoma's about negotiating a new contract. Had Scoma's not withdrawn recognition, it is likely that Lian Alan still would be ignoring the employees there.

Importantly, Mr. Alan stated that he does not recall any specific discussion of immigration issues while soliciting the revocation signatures. It seems highly improbable that in meeting with these 6 employees for between "an hour and two hours", in which 4 of the 5 employee witnesses specifically reported comments made by Mr. Alan about immigration, that Mr. Alan can not even recall a discussion about that specific topic.

Further, Mr. Alan testified that he gave Clem Hyndman, the Union shop steward at Scoma's, General Counsel Exhibit 4. As the shop steward, Clem Hyndman would bring the message of the Union to the Scoma's employees and sometimes would deliver messages from Mr. Alan. When asked, Mr. Alan testified that he does not remember if he told Hyndman to gather signatures on General Counsel Exhibit 4. What then was the purpose of giving it to her? Why would Mr. Alan not be able to remember this? Why would he not want to admit this? Neither the Union nor General Counsel called Ms. Hyndman or Ms. Munoz to the stand, though their testimony could have bolstered (or not) Mr. Alan's testimony and denials.

Mr. Alan also stated that workers felt they were tricked into signing the decertification petition. However, on cross-examination, he was first unable to state exactly which employees said they were tricked into signing the decertification petition, then testified "multiple employees said that", and then finally was only able to say it was Fernando Montalvo. Conveniently for Mr. Alan, out of the 6 employees in the group, Fernando Montalvo was the only one not called as a witness.

**E. Adverse Inference for Failure to Call Witnesses:**

Lian Alan testified that Maria Munoz, an employee at Castlewood Country Club in Pleasanton, California, was with him during all the conversations with the employees. Juan Santos, Luciano Yah Chi, Nicolas Villalobos, and Jose Magdaleno also testified that shop steward, Clem Hyndman, was present during the conversations.

However, General Counsel failed to call either Clem Hyndman or Maria Munoz to rebut the employees' testimony about the coercive statements made by Mr. Alan. See *International*

*Automated Machines*, 285 NLRB 1122, 1122-23 (1987), enfd. 861 F.2d 720 (6th Cir. 1988) ("... when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an **adverse inference** may be drawn regarding any factual question on which the witness is likely to have knowledge"). Clearly, Clem Hyndman, the shop steward, and Maria Munoz who took the time to drive from Pleasanton and accompany Mr. Alan to solicit revocation signatures, are favorably disposed towards the Union. Due to General Counsel's failure to call them to testify about Lian Alan's statements, it is inferred that Maria Munoz and Clem Hyndman, the shop steward, would have supported the testimony of Juan Santos, Luciano Yah Chi, Rene Rivera, Nicolas Villalobos, and Jose Magdaleno. See also *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006) (noting that an ALJ may draw an adverse inference from a party's failure to call a witness who may reasonably be assumed to be favorably disposed to a party, and who could reasonably be expected to corroborate its version of events, particularly when the witness is the party's agent).

This adverse inference supports a finding that Juan Santos, Luciano Yah Chi, Rene Rivera, Nicolas Villalobos, and Jose Magdaleno were telling the truth about the statements that Lian Alan made while soliciting their signatures.

#### IV.

### LEGAL ANALYSIS

#### A. Standard for Unilateral Withdrawal of Recognition:

Under *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001), an employer can unilaterally withdraw recognition from an incumbent union on a showing that the union has, in fact, lost the support of a majority of the employees in the bargaining unit.

*Levitz* states that if the General Counsel comes forward with evidence rebutting the employer's evidence, the burden remains on the employer to establish loss of majority support by a preponderance of the evidence: "If the union contests the withdrawal of recognition in an unfair labor practice proceeding, the employer will have to prove by a preponderance of the evidence that the union had, in fact, lost majority support at the time the employer withdrew recognition. If it fails to do so, it will not have rebutted the presumption of majority status, and the withdrawal of recognition will violate Section 8(a)(5)."

In this case, the evidence on which Scoma's relied in withdrawing recognition did demonstrate the Union's actual loss of majority status. Scoma's received objective and untainted evidence in the form of a decertification petition signed by 29 of the 54 employees in the bargaining unit. This represented 54% of the employees in the bargaining unit, and justified Scoma's unilateral withdrawal of recognition under *Levitz*. See also *Dura Art Stone, Inc.*, 346 NLRB 149 (2005) (employer must cease bargaining for a new contract when it knows the union has lost majority support).

To rebut Scoma's showing of objective evidence supporting withdrawal of recognition, General Counsel presented at the hearing evidence that had never before been shared with Scoma's: that six employees (Fernando Montalvo, Juan Santos, Luciano Yah Chi, Rene Rivera, Nicolas Villalobos and Jose Magdaleno) had signed a document revoking their signatures (General Counsel Exhibit 3). There was also evidence that another two employees (Carlos Mazariegos and Rosendo Carrasco) signed General Counsel Exhibit 4. Should these 8 signatures not be counted on the decertification petition, there would only be 21 valid signatures favoring decertification, which is not sufficient to show that the Union had lost majority support at Scoma's.

Under *Levitz*, Scoma's must now show that the signatures of Fernando Montalvo, Juan Santos, Luciano Yah Chi, Rene Rivera, Nicolas Villalobos, Jose Magdaleno, Carlos Mazariegos and Rosendo Carrasco on the decertification petition remain valid.

**B. Coerced Signatures:**

The evidence shows that Lian Alan threatened the 6 employees (Fernando Montalvo, Juan Santos, Luciano Yah Chi, Rene Rivera, Nicolas Villalobos, Jose Magdaleno) with, *inter alia*, challenges to their immigration status to get them to revoke their signatures on the decertification petition. Such threats clearly interfere with the employees' Section 7 rights, and any such "revocation" signatures must be deemed to be coerced and invalid.

The evidence also shows that the unlawful statements regarding immigration and loss of benefits were made to an entire group of employees, including Fernando Montalvo, Juan Santos, Luciano Yah Chi, Rene Rivera, Nicolas Villalobos and Jose Magdaleno, as part of a conversation in front of Scoma's restaurant that continued down the pier in front of Barren

Restaurant. Therefore, all six of these employee's "revocation signatures" are tainted by Mr. Alan's threats and are of no effect, as are Rene Rivera's, Nicholas Villalobos', Jose Magdaleno's and Luciano Yah Chi's signatures on General Counsel Exhibit 4.

**C. Signatures of Carlos Mazariegos and Rosendo Carrasco on General Counsel Exhibit 4 Are of No Effect:**

Carlos Mazariegos and Rosendo Carrasco, two employees who originally signed the Decertification Petition, signed a document on October 30, 2013 which stated in pertinent part, "We wish to continue to be represented by UNITE HERE 2850 for the purposes of collective bargaining. We want to bargain with the management of Scoma's. . ." (General Counsel Exhibit 4). Unlike the 6 other employees, these two employees did not sign General Counsel Exhibit 3 revoking their signatures on the decertification petition.

Carlos Mazariegos, an employee at Scoma's, testified that he signed the Decertification Petition on October 16, 2013. On October 30, 2013, Mr. Mazariegos was told by Clem Hyndman, a Union agent who was shop steward at Scoma's, to sign a document entitled "We Are United!" (General Counsel Exhibit 4). Mr. Mazariegos testified that in a two to three minute conversation with Ms. Hyndman, she told him he should support the Union or [we] might lose all benefits. He testified "well, I felt a little intimidated, so I signed it."

The name of another Scoma's employee, Rosendo Carrasco, who had signed the Decertification Petition on October 6, 2013, also appears on General Counsel Exhibit 4, but it is printed and not in cursive. It is entirely dissimilar from Mr. Carrasco's rather distinctive signature on both the decertification petition and the signature exemplars from the employee files (Joint Exhibit 5). Its authenticity is in doubt.

Mr. Alan testified that he gave General Counsel Exhibit 4 to Ms. Hyndman, but did not remember whether he asked her to get signatures. Thus, there was no evidence presented on how Ms. Hyndman allegedly obtained the signature of Rosendo Carrasco, or, if she did, whether his printed "signature" was genuine. General Counsel failed to call Clem Hyndman as a witness to authenticate Rosendo Carrasco's signature on General Counsel Exhibit 4, or to testify that she personally witnessed his signature. Because the "signature" is so dissimilar from the exemplar and the authenticated signature on the Decertification Petition, General Counsel did not meet its

burden proving that Rosendo Carrasco signed General Counsel Exhibit 4.

**D. Scoma's Evidence of Loss of Majority Union Support Remains Valid:**

Scoma's needed 27 valid signatures (50% of the bargaining unit) on the decertification petition in order to show that the Union had lost its majority support on October 31, 2013. Scoma's presented evidence of 29 signatures of employees who did not wish to be represented by the Union.

General Counsel then presented evidence that 6 of these signatures were revoked and evidence that another 2 of the employees signed a statement wishing to continue to be represented by the Union, reducing the number to 21.

However, Fernando Montalvo, Juan Santos, Luciano Yah Chi, Rene Rivera, Nicolas Villalobos and Jose Magdaleno's revocation signatures were coerced and tainted. Therefore, their original signatures on the decertification petition remain valid, which brings the number of decertification petition signers to 27. This is sufficient for Scoma's withdrawal of recognition to be lawful under *Levitz*.

Further, there was no competent evidence at all that Rosendo Carrasco signed General Counsel Exhibit 4. Therefore, his signature on the original decertification petition remains valid. For the reasons discussed *infra*, Mr. Mazariegos' signature was also coerced and is likewise invalid. Adding these two signatures brings to 29 the number of employees supporting decertification, a clear majority.

**E. Scoma's Had Knowledge that 3 Additional Employees Did Not Support the Union:**

Roland Gotti testified that he knew of three additional employees who did not support the Union, but did not sign the decertification petition: Bobby Johnson, and Mr. Gotti's two nephews, Colton Khan and Kyler Khan.

Colton Kahn and Kyler Khan both told Mr. Gotti that they wished they were there to sign the petition (they were both away at school at the time); Bobby Fisher told Mr. Gotti that he didn't want to be a member of the Union.

General Counsel may argue that when it withdrew recognition, Scoma's must have known of all of the evidence on which it later relied at the unfair labor practice hearing to prove loss of majority support. *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001) does not

stand for that proposition.

*Levitz* specifically states: *Under our new standard*, an employer can defeat a post-withdrawal refusal to bargain allegation *if it shows, as a defense, the union’s actual loss of majority status.*” (emphasis added) 333 NLRB at 717. However, *Levitz* never stated that all of the evidence supporting an actual loss of majority support must be known to the employer at the time it withdraws recognition.

This makes sense: if evidence of which the Employer had no knowledge at the time they withdrew recognition can be used to show that the Union did not actually lose majority support (i.e., the revocation signatures), it is only fair that evidence unknown to the Employer at the time they withdrew recognition may be used to show the Union’s actual loss of majority support.

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## V.

### **PUBLIC POLICY FAVORS THE DISCLOSURE TO SCOMA’S THAT THE UNION DISPUTED LOSS OF MAJORITY SUPPORT**

Clearly, the Union has engaged in gamesmanship by withholding the revocation signatures after Scoma’s relied on the signatures on the decertification petition. Regrettably, this gamesmanship was at the expense of the employees’ fair representation and Section 7 rights.

The National Labor Relations Act (the “Act”) affords employees the rights to organize and to engage in collective bargaining free from employer interference. *NLRB v. Health Care & Ret. Corp. of Am.*, 511 U.S. 571, 572 (1994). First and foremost, it must be noted that there has been no allegation of employer interference or taint on the decertification petition. *See, e.g., Lee Lumber & Bldg. Material Corp. v. NLRB* (“*Lee Lumber*”), 117 F.3d 1454, 1458 (D.C. Cir. 1997) (where unfair labor practice allegations against employer are analyzed to determine whether they tainted a decertification petition). To the contrary, here there are no other unfair labor practice charges or even allegations of Scoma’s tainting the decertification petition; the desire to decertify represents the will of the employees.<sup>3</sup>

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<sup>3</sup> At the time Scoma’s withdrew recognition, the decertification petition contained more than half of Scoma’s employees’ signatures. At the hearing in this matter, Scoma’s counsel submitted an offer of proof that a new decertification petition was circulated – again without interference or any actions by

Thus, the issue remains how to address the Union's deceitful tactics of withholding the revocation signatures (which were obtained by duress and undue influence) until after (1) it knew Scoma's received the employee petition to decertify; (2) Scoma's reviewed the petition and withdrew recognition; and (3) it filed the unfair labor practice charge against Scoma's.<sup>4</sup> Further, it wasn't until after the employees' Decertification Petition, filed on October 29, 2013 in Case No. 20-RD-115782 was subsequently withdrawn as moot after Scoma's withdrew recognition that the Union filed the instant Unfair Labor Practice Charge.

Public policy condemns this kind of gamesmanship and supports the contention that the Union should have disclosed to Scoma's the revocation signatures. By doing so, recognition would not have been withdrawn and the will of the employees would have been heard by having an election. The Union's malfeasance subverted the very will of the employees it purports to represent in this case.

A purpose of the Act is "to redress the perceived imbalance of economic power between labor and management." *Brevard Achievement Center, Inc. and Transport Workers Union of America, Local 525, AFL-CIO*, 342 N.L.R.B. 982, 985 (N.L.R.B. 2004) (citing *American Ship Building Co. v. NLRB*, 380 U.S. 300, 316 (1965)). This redress includes the rights of employees to organize and bargain collectively. However, the Board has expressly stated that one of the purposes of the Act is not to induce gamesmanship. *Aero Engineering Corporation and Lodge 1303, International Association of Machinists and Aerospace Workers, AFL-CIO*, 177 N.L.R.B. 176 (N.L.R.B. 1969) (where Board found that actions that would "constitute an inducement to 'gamesmanship' [] would not effectuate the policies of the Act.")). That is the very inducement that the Union has relied upon here: it knew that an employee had submitted a decertification petition to Scoma's; it knew it obtained (regardless of the coercion and duress it utilized) revocation signatures; it knew it had this in its possession at the time Scoma's withdrew

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Scoma's – and now more than 70% of Scoma's employees wish to decertify. Employee "free choice" is a "core principle" of the Act. *Lee Lumber*, 117 F.3d 1461.

<sup>4</sup> Neither the Union nor the Board would disclose the revocation signatures to Scoma's until a charge was filed against it (and Scoma's never saw any evidence until the hearing), thereby rendering any ability to try and resolve this matter as between Scoma's and the Union or, once the charge was filed, the Board, void. This gives the appearance that both the Union and the Board were merely looking for an excuse to charge and prosecute, not to protect the rights or will of Scoma's employees. Surely that is not the policy that either the Union or the Board should wish to convey.

recognition – an act that went beyond good-faith doubt in the Union’s majority as Scoma’s had no reasonable doubt to conclude otherwise; the Union relied on the strict-liability nature of the current state of the law in which to file the current charge.

Here, the Union’s misconduct was insidious and egregious: it withheld vital information from Scoma’s, then proceeded to file the charge against Scoma’s alleging wrongful withdrawal of recognition. Instead, a far more sound policy would have been for the Union, upon obtaining its (tainted) revocation signatures, to have presented this evidence to Scoma’s and to demand prompt re-recognition or, in the alternative, to allow for an election. Such dialogue and negotiation, as opposed to litigation, between labor and management is a principal tenet of the Act and federal labor policy. *See Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 211 (1964).

The Union’s admitted and intentional failure (solely through the acts of its agent Lian Alan) to advise Scoma’s, if allowed to stand, would only act as an inducement of gamesmanship that the Board has stated defies the purposes of the Act. Moreover, the goal of the Union (through Lian Alan) appears also to be aimed at a vindication of Mr. Alan’s own private rights due to being an absent union representative; this also is an abuse of the process as Board proceedings are not for the vindication of private rights, but are brought in the public interest and to effectuate statutory policy. *Teamsters Local 294 (Island Duck Lumber)*, 145 NLRB 484, 492 fn. 9 (1963), *enfd.* 342 F.2d 18 (2d. Cir. 1965) citing *NLRB v. Plumbers Union of Nassau County Local 457*, 299 F.2d 497 (2d Cir. 1962).<sup>5</sup>

Neither the public interest nor statutory policy are effectuated where the Union knowingly withheld information from Scoma’s regarding the decertification petition and revocation signatures. While *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001) states an employer withdraws recognition at its own peril, *Levitz* did not envision or even touch upon a situation in which the union possessed but intentionally withheld from the employer evidence that would provide doubt about the will of the employees. Rather, *Levitz* makes clear that its

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<sup>5</sup> It is for this reason a bargaining order is not the applicable, or even good remedy. The Union’s gamesmanship casts a unit of employees into the abyss for a period of years despite the fact that, at present, an overwhelming majority wish to decertify. Because affirmative bargaining orders interfere with the employee "free choice" that is a "core principle" of the Act, courts have long viewed them with suspicion. *See Skyline Distribs. v. NLRB*, 99 F.3d 403, 411 (D.C. Cir. 1996).

“essence and purpose” is protecting the employees’ Section 7 rights to freely choose their representatives. This right is protected by requiring the Union to “show its cards” and request re-recognition by the employer when facts such as in the instant case exist.

Given the "essentially remedial" objectives of the Act, which disfavors punishment, an upholding of the charge in this matter, or even an order to bargain, would be tantamount to just that. *See International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 52 (1979) (where Supreme Court has refused to permit punitive sanctions in certain unfair labor practice cases, citing examples).

From “the earliest days of the Act, the Board has sought to foster industrial peace and stability in collective-bargaining relationships, as well as employee free choice[.]” *Levitz*, 333 NLRB at 720. A public policy in which the union is entitled (and induced) to sit back on its laurels and, through no fault, misconduct or even participation of any kind by the employer, file a charge and see vindication of its private rights, and in stark contrast to the free choice of its members, does nothing to foster industrial peace or stability in collective bargaining relationships. To the contrary, it foments further adversarial positions and encourages the type of gamesmanship by both parties that the Act is purposed against.


## V.

### CONCLUSION

Scoma’s received objective proof of the Union’s actual loss of majority status and any signature evidence rebutting this was obtained through Union coercion, and was invalid. Accordingly, the complaint should be dismissed.

Dated: January 13, 2015

SMITH DOLLAR PC

By   
Diane Aqui  
Attorney for Respondent  
SCOMAS OF SAUSALITO, LLC

## PROOF OF SERVICE

I am employed in the County of Sonoma, State of California. I am over the age of 18 years and not a party to the within action. My business address is 404 Mendocino Avenue, Second Floor, Santa Rosa, CA 95401. On January 13, 2015, I served the **RESPONDENT SCOMAS OF SAUSALITO, LLC'S CLOSING BRIEF** on the parties to this action by serving:

Sarah McBride  
United States Government, National  
Labor Relations Board  
Region 20  
901 Market Street, Suite 400  
San Francisco, CA 94103-1738

Telephone: (415) 356-5144  
Facsimile:  
Email: sarah.mcbride@nrlrb.gov

Glenn M. Taubman  
National Right to Work Legal Defense  
Foundation, Inc.  
8001 Braddock Road, Suite 600  
Springfield, VA 22160

Telephone: (703) 321-8510  
Facsimile:  
Email: gmt@nrtw.org

Elizabeth Hinckle  
Davis, Cowell & Bowe, LLP  
595 Market Street, Suite 1400  
San Francisco, CA 94105-2821

Telephone: (415) 597-7200  
Facsimile: (415) 597-7201  
Email: eqh@dcbsf.com

Joseph Frankl  
United States Government, National  
Labor Relations Board  
Region 20  
901 Market Street, Suite 400  
San Francisco, CA 94103-1738

Telephone: (415) 356-5130  
Facsimile: (415) 356-5156  
Email:

/X/ BY **U.S. MAIL**: I placed each such sealed envelope, with postage thereon fully prepaid for first-class mail, for collection and mailing at the address above, following ordinary business practices. I am readily familiar with the practice of Smith Dollar PC for processing of correspondence, said practice being that in the ordinary course of business, correspondence is deposited in the United States Postal Service the same day as it is placed for processing.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: January 13, 2015

/S Abbott/

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Stephanie Abbott